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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Frank Gonzales, et al.,	)	No. CV-04-903-PHX-DGC
Plaintiffs,	)	<b>ORDER</b>
vs.	)	
Phelps Dodge Miami, Inc., a Delaware	)	
corporation, et al.,	)	
Defendants.	)	

Plaintiffs have filed a motion for leave to amend their second amended complaint. Doc. #68. The motion seeks to add a claim for breach of fiduciary duty under *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064 (9<sup>th</sup> Cir. 2005). Defendant Phelps Dodge Miami opposes the motion, arguing that Plaintiffs lack “good cause” under Rule 16(b) and cannot meet the standards for amendment under Rule 15. Doc. #72.

The Case Management Order contains the following paragraph:

2. Deadline for joining parties and amending pleadings. The deadline for joining parties and amending pleadings is **90 days** from the date of this Order. Motions to join parties or for leave to amend pleadings shall be filed within **30 days** of this Order so they can be heard and decided prior to the deadline.

Doc. #11 (emphasis in original). The Case Management Order was dated July 1, 2004. The deadline for filing motions to amend pleadings was therefore July 31, 2004. The final deadline for amending pleadings was September 29, 2004. This motion was filed more than 19 months after the deadline.

1 Rule 16(b) states that the schedule established in a case management order “shall not  
2 be modified except upon a showing of good cause . . . .” This “good cause” standard  
3 primarily considers the diligence of the party seeking amendment. *Johnson v. Mammoth*  
4 *Recreation, Inc.*, 975 F.2d 604, 609 (9<sup>th</sup> Cir. 1992). “The district court may modify the  
5 pretrial schedule ‘if it cannot reasonably be met despite the diligence of the part[y] seeking  
6 the extension.’” *Id.* (quoting Fed. R. Civ. P. 16 advisory committee notes (1983 Am.)).

7 **1. Plaintiffs substantially delayed their motion to amend.**

8 Plaintiffs are former employees of Defendant Phelps Dodge Miami. Plaintiffs were  
9 laid off in January of 2002 and commenced this action by filing a breach of contract claim  
10 in state court on October 8, 2003, alleging that Defendant wrongfully denied them severance  
11 pay. Plaintiffs filed an amended complaint on November 25, 2003. Defendant removed the  
12 action to this Court on April 29, 2004, asserting that Plaintiffs’ breach of contract claim was  
13 pre-empted by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001  
14 *et seq.* Doc. #1. On July 8, 2004, Plaintiffs amended their complaint a second time with  
15 leave of court, alleging alternative claims for recovery of benefits and failure to supply  
16 information under ERISA. Doc. #13.

17 On October 4, 2004, Plaintiffs filed a motion seeking a third amendment. Doc. #18.  
18 The Court denied the motion, finding that the time for amending had passed and that  
19 Plaintiffs had failed to satisfy the “good cause” standard of Rule 16(b). Doc. #22.

20 On December 16, 2004, and despite the fact that this case had been pending in federal  
21 court for more than six months, the parties informed the Court that they disagreed on whether  
22 the case was subject to ERISA and federal question jurisdiction. Doc. #23. Plaintiffs had  
23 asserted ERISA claims in their second amended complaint, but only as alternatives to their  
24 breach of contract claim. The Court set an expedited discovery and briefing schedule.  
25 Doc. #26. In an April 25, 2005 order, the Court concluded that Plaintiffs sought to recover  
26 benefits promised under Defendant’s ERISA-governed Severance Plan, not Defendant’s  
27 Employee Handbook or the General Release Plaintiffs signed when they were laid off, and  
28 that the case accordingly was governed by ERISA and properly in federal court. Doc. #32.

At a status hearing held on May 20, 2005, the parties agreed that the Court should next determine whether Defendant's Severance Plan was properly terminated. Additional discovery was permitted, and on September 16, 2005, the parties filed motions for summary judgment. Doc. #48. Briefing was completed on December 28, 2005, and on April 14, 2006, the Court issued an order granting Defendant's motion for summary judgment. Doc. #63. The Court concluded that Defendant's Severance Plan was properly terminated. *Id.* This ruling eliminated all of Plaintiffs' claims with the exception of a statutory claim for alleged failure to notify Plaintiffs of the termination.

Because the case appeared to be largely resolved, the Court scheduled a status conference for April 28, 2006, to determine what additional litigation, if any, was required. Plaintiffs stated at the status conference that they intended to file yet another motion to amend the complaint, this one to assert a claim for breach of fiduciary duty under ERISA. The Court established a briefing schedule (Doc. #65) and Plaintiffs filed the present motion.

## **2. Plaintiffs could have sought amendment earlier.**

Plaintiffs claim that they could not have sought amendment at an earlier time because the Ninth Circuit did not recognize a claim for breach of fiduciary duty under ERISA until the *Peralta* decision on August 18, 2005. Plaintiffs point to no authority suggesting that such a claim was prohibited in this circuit (or elsewhere) prior to *Peralta*, and Defendant notes that federal courts have recognized the claim for years. *See Willet v. Blue Cross and Blue Shield of Alabama*, 953 F.2d 1335, 1340 (11<sup>th</sup> Cir. 1992); *Rucker v. Pacific FM, Inc.*, 806 F.Supp. 1453, 1459 (N.D. Cal. 1992) (applying Ninth Circuit law); *Presley v. Blue Cross and Blue Shield of Alabama*, 744 F.Supp. 1051, 1058 (N.D. Ala. 1990); *see also* 29 U.S.C. § 1105. Although not directly addressing the issue, the Ninth Circuit acknowledged such authority in 1991. *See Acosta v. Pacific Enterprises*, 950 F.2d 611, 618-19 (9<sup>th</sup> Cir. 1991) ("Other circuits, applying a similar analysis, have recognized that an ERISA fiduciary's duty to disclose information is not limited to the dissemination of the documents and notices specified in 29 U.S.C. Sections 1021-31, but may in some circumstances extend to additional disclosures where the interests of the beneficiary so require). ERISA is a federal statute

1 subject to nationwide interpretation in the federal courts. These authorities make clear that  
2 such a claim was recognized in federal law before Plaintiffs' complaint was filed.

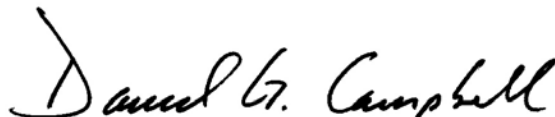
3 Additionally, the factual basis for Plaintiffs' proposed amendment has been known  
4 from the start of this case. The gravamen of Plaintiffs' proposed amendment is that  
5 Defendant failed to notify them of the Severance Plan's termination. Plaintiffs specifically  
6 alleged this fact – without stating a claim for breach of fiduciary duty – in their second  
7 amended complaint. Doc. #13, ¶ 31. Moreover, as Defendant notes, Plaintiffs inquired about  
8 such a breach of fiduciary duty in the deposition of Defendant's Director Health and Welfare  
9 Benefits before *Peralta* was decided. See Doc. #72 at 8.

10 **3. Plaintiffs have not shown good cause.**

11 As noted above, the “good cause” standard of Rule 16(b) primarily considers the  
12 diligence of the party seeking amendment. *Johnson*, 975 F.2d at 609. The Court concludes  
13 that Plaintiffs could, if diligent, have asserted their claim for breach of fiduciary duty within  
14 the time period allowed for amendment under the Court's Case Management Order. The  
15 authority for such a claim was recognized in published federal decisions and the facts  
16 underlying the claim were known to Plaintiffs. For this reason, Plaintiffs have failed to  
17 establish good cause to alter the litigation schedule and their motion to amend will be denied.  
18 In light of this ruling, the Court need not address whether Plaintiffs can satisfy the  
19 amendment requirements of Rule 15 at this late stage of the case.

20 **IT IS HEREBY ORDERED** that Plaintiffs' Amended Motion for Leave to Amend  
21 the Second Amended Complaint (Doc. #68) is **denied**.

22 DATED this 7<sup>th</sup> day of June, 2006.

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David G. Campbell  
United States District Judge